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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2337 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?

4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge? : NO

SMT.PURNABEN PRSANSHANKER PANDYA

Versus

SHRI.T.P. & SMT.M.T.GANDHI MUNI GIRL'S H.SCHOOL & ORS.

Appearance:

MR AY KOGZE for Petitioner
MR RA PATEL for Respondent No. 1
MR VIJAY H PATEL for Respondent No. 2
MR MUKESH A PATEL for Respondent No.3
MR GM JOSHI for Respondent No.4

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 27/10/1999

ORAL JUDGEMENT

1. Relying on proviso to subsection 5 of section 35
of the Gujarat Secondary Education Act, 1972, learned
counsel for the petitioner contended that the petitioner
being a senior teacher in the school in which the
appointment was to be made on the post of Headmaster she

has first and preferential claim for appointment on the said post.

2. The facts of the case, in brief, are that the petitioner is a teacher in the respondent No.1 -school since last 16 years. The post of Headmaster of the school fell vacant and the applications were invited for filling of that post by open selection in consultation with the respondent No.2 by the respondent No.1. The selection committee interviewed the candidates who were called for the interview for making the selection on the post of Headmaster. It is not in dispute that the petitioner and late Smt. Surbiben U Bhatt were interviewed by the selection committee and Smt. Surbiben U Bhatt was selected and appointed as Headmaster of the respondent No.1 school w.e.f. 1st August, 1988. Having felt aggrieved of this selection of late Smt. S.U. Bhatt, on the post of Headmaster of the respondent NO.1 -school, the petitioner preferred an application NO. 689 of 1988 before the Gujarat Secondary Education Tribunal at Ahmedabad. That application came to be rejected by the Tribunal on 2-2-1989. Hence, this special civil application before this court.

3. During the pendency of this special civil application, Smt. S.U. Bhatt, who was originally impleaded as respondent No.3 to this petition expired. After her death, fresh advertisement has been issued inviting the applications for making selection and appointment on this post which fell vacant due to the death of the said lady. This time again, the petitioner applied but the respondent No.4 - Bartiben M. Trivedi was selected and appointed. The petitioner filed civil application No.3175 of 1995 to implead the respondent No.4 as party to this petition and this application came to be granted. This court has ordered that the appointment of respondent NO.4 shall be subject to the decision of this writ petition. This order preferably is passed on civil application No.3175 of 1995.

4. Shri G.M. Joshi, learned counsel for the respondent NO.4 contended that no relief has been prayed for against the respondent No.4 in this special civil application and this writ petition deserves to be dismissed qua the respondent No.4. Second preliminary objection has been raised that the selection of respondent No.4 has not been challenged by the petitioner before the Gujarat Secondary Education Tribunal nor in this special civil application and on this ground this petition deserves to be dismissed against the respondent NO.4. Carrying these two contentions further, Shri G.M.

Joshi, learned counsel for the respondent No.4 submits that this petition has been filed challenging therein the selection of respondent No.3. Smt. S.U. Bhatt since deceased, and on her death, this petition has become infructuous. The selection of the respondent NO.4 has been challenged by one Shri V.C. Thakkar one of the candidates in the selection before the Gujarat Secondary Education Tribunal at Ahmedabad. He prayed for the interim relief initially and the interim relief has been granted but later on on 1-3-1996, the same was vacated. This fact has been referred for the information of this court by Shri G.M. Joshi.

5. Shri Kogze submits that the appointment of the respondent No.4 as Headmaster of the school was subject to the decision of this court and as a result thereof, the petitioner was not required to challenge the selection of her either before the Tribunal or before this court in this special civil application or by filing a separate special civil application. It has next been contended that the petitioner challenged her nonselection on the post of Headmaster in the selection in which Smt. S.U. Bhatt was selected and in case this claim of the petitioner is accepted by this court then she will be deemed to have been appointed on this post from the date on which Smt. S.U. Bhatt was appointed i.e. 1st August, 1988 and the selection of the respondent NO.4 made will be of no consequence and effect and she has to vacate this post for the petitioner in pursuance of the order of this court that her appointment is subject to the decision given in this special civil application. On merits, learned counsel for the petitioner submits that the provisions of section 35 (5) of the Gujarat Secondary Education ACT, 1972 is very clear and the petitioner being a senior teacher of the school concerned where this appointment of the Headmaster has to be made and she was eligible and suitable for the said post she could have only been appointed and not late Smt. S.U. Bhatt. In support of this contention, Shri Kogze placed reliance on the decision of this court in the case of Maganbhai vs. Olpad Taluka Azaddin reported in 1982 (1) GLR 664. It has next been contended that the nonselection of the petitioner on the post of Headmaster is as a result of the malafide of one of the members of the selection committee namely Mr. B.J. Kanabara. Mr. B.J. Kanabara had prejudiced against the petitioner and he out of ten marks only awarded one mark in viva-voce otherwise other three members have awarded sufficiently high marks to her in viva-voce. On being asked by the court, Shri Kogze states that that member was prejudiced for the reason that earlier the petitioner filed special civil

application NO.4116/87 challenging therein the selection of Mr. P.K. Rupala as Headmaster of the school on the ground that it is contrary to the provisions of Gujarat Secondary Education Regulations, 1974 as it being the school for girls only female candidate could have been appointed on this post and she succeeded in this special civil application. Shri Kogze admits that in the selection committee which selected Shri P.K. Rupala, Shri B.J. Kanabar was not the member of the selection committee. He further admits that this person was representative of the managing committee. Other members of the managing committee has awarded marks to the petitioner in viva-voce. Shri Kogze further admits, on being asked by the court, that this is the only reason of prejudice of Mr. B.J. Kanabar. He has not alleged any personal prejudice against the petitioner of Shri Kanabar.

6. Shri G.M. Joshi, learned counsel for the respondent No.4, contended that only in case the senior teacher of the same school and outsider if both are of same merits then only preference can be given to the senior teacher of the school concerned but not as a rule or course. It has next been contended that in case the contention of the learned counsel for the petitioner is accepted then this rule will become redundant and the provision made for making the appointment after selection on the criteria of merit-cum-seniority will be of no effect and there is a thumb rule that the senior teacher of the school itself has to be given the appointment. Lastly, it is contended that where the appointment has been made on the criteria of merit-cum seniority, the preference can only be given when both the candidates are of equal merits. In support of this contention, Shri Joshi placed reliance on the decision of the Apex Court in the case of Executive Officer vs. E. Tirpalu reported in 1996 (8) SCC 253. In his submission, the selection committee has awarded to the petitioner 98 marks whereas the respondent NO.3 was awarded 105.6 marks. The petitioner could not stand to comparative merits with the respondent NO.3 and the respondent NO.3 has rightly been selected and appointed by the school.

7. The counsel for the other respondents have supported the arguments advanced by the learned counsel for the respondent NO.4.

8. Having considered the rival contentions made by the learned counsel for the parties, I am satisfied that this claim of the petitioner does not deserves acceptance.

9. Section 35 (5) of the Gujarat Secondary Education Act, 1972, reads as under:

35 (5) The Special school committee shall select persons for appointment to the post of Headmaster of the school from amongst persons referred to in subsection (4) or from amongst the teachers in the school:

Provided that for the purpose of such selection, preference shall be given to a senior teacher (serving in the school or schools under the same management,) if he is otherwise eligible and suitable.

10. Section 17 (26) of the Act envisage the Board with the powers to lay down qualifications, methods of selection and condition of appointment of the Headmaster and teacher as well as non-teaching staff to be appointed in the school. In exercise of these powers, as what it transpires from the judgment of the Tribunal and which has not been contested by the counsel for the petitioner, the Board devised a scheme whereby out of 45 marks, marks are to be given under different heads to the candidates who appeared for interview for the post of Headmaster are as under:

10 marks - educational qualification
10 marks - professional qualification
05 marks - postgraduate qualification
05 marks - educational experience
05 marks - administrative experience
10 marks - overall impression of the candidate.

11. At the time of interview, each member of the selection committee gave marks individually under the different heads. The awarding of marks under the heads other than the head - overall impression of the candidate, have not been challenged by the counsel for the petitioner. The counsel for the petitioner contended that one member of the selection committee has arbitrarily and in fact with the object to see that the petitioner is not selected, awarded very low mark in the head of overall impression of the candidate. Three other members have given more marks to the petitioner than the respondent NO.3, since deceased. In case this would not have been done, the difference of the marks would not have been to the extent of what it is there.

12. I do not find any merits in this contention. Out

of ten marks, four members have to award marks to the petitioner. Merely because one of the members has awarded less marks to the petitioner under the head of overall impression of the candidate, it is too difficult to say what to accept that he did all this as he was prejudiced against the petitioner. This act alone of one of the members of the selection committee cannot be taken to be malafide more so when difference of marks is of about 8 marks in between the candidates. Out of 45 marks, if we go by the different heads, so far as 35 marks are concerned, the whole process of assigning of these marks is absolutely objective. The petitioner has failed to alleged any personal prejudice or bias of the one of the members of the selection committee against her. Merely because, the petitioner challenged the alleged selection made of Mr. P.K.Rupala when that person was not the member of the selection committee is itself not sufficient on the basis of which it can be accepted that as a result of malafide, he has awarded low marks to the petitioner under the head of overall impression of the candidate. He was only one of the members of the managing committee of the school. Not only this, the petitioner utterly failed to make out any nexus or interest or relation of that member with Mr. P.K. Rupala. Further the petitioner also failed to established any nexus or interest or relation of that member with respondent NO.3, since deceased. The facts which have been stated by the petitioner in this special civil application are hardly sufficient to make out a case that that member has acted malafide against the petitioner. Moreover, the learned counsel for the petitioner has failed to illustrate how the awarding of marks by the member concerned would have materially affected the result of the selection. It is no more res integra that the person against whom malafide are alleged is a necessary party to the proceedings and in case he has not been impleaded as a party the court can not go into, examine and decide the question of malafide raised in the petition behind the back of that persons. Reference in this respect may have to the decision of the Apex Court in the case of J.N. Banavalikar vs. Municipal Corporation of Delhi reported in AIR 1996 SC 326. So both on merits as well as on the ground aforesaid, the plea of malafide raised against one of the members of the selection committee is not tenable and it can not be accepted. Moreover, the petitiotoenr knowing all these facts has not raised any objectin andhas taken chance of selection. When she was not selected she raised this objection. She is otherwise also estopped from raising this point.

13. Learned counsel for the petitioner, though placed strong reliance on the decision of this court in the case of Maganbhai vs. Olpad Taluka Azaddin (*supra*) but I do not find anything in the judgment which supports the case of the petitioner. This decision is of little help to the petitioner in this case. The ratio of this decision, on the other hand, supports the contentions of the other side. Therein also, this Court has held that if the candidates are of equal merits, then only preference will be given to the senior teacher of the school concerned. It is fruitful here to reproduce the relevant portion of that judgment which is as under:

With respect to the Tribunal, I am of opinion that the Tribunal has erred, as rightly contended by the learned advocate of the petitioner, and misconstrued the proviso when it held that it was not disputed that the selection for the post of Principal is to be made purely on merits. In my respectful opinion, the Tribunal has failed to appreciate that the proviso in effect and substance prescribes the criteria of selection for the post of Principal on the basis of merit-cum-seniority. In other words, if everything is equal, on the ground of eligibility and suitability, the preference is to be given to the senior most teacher serving in the school or schools under the same management.

The scheme for selection for the appointment to the post of teachers and Principal appears to be that appointment as a teacher is to be made from amongst persons who are qualified to be appointed as teachers in accordance with the Regulations made in that behalf while the selection of persons for appointment to the post of Headmaster of the school is to be made from amongst persons so qualified or from amongst the teachers in the school for which the appointment of Principal is to be made. The proviso, however, enjoins that for purposes of such selection, a senior teacher, serving in the school or schools under the same management, is to be preferred if he is otherwise eligible and suitable. The legislative intent behind this appears to be clearly manifest in this provision that when the competition is between the teachers employed in the same school and the outsiders, preference is to be given to the senior teacher serving in the school,

provided he is otherwise eligible and suitable. The rationale underlying this proviso appears to be that a senior teacher who has put in services in a school for which the appointment of Principal is to be made, is to be preferred not only qua his junior teachers but qua outsiders, provided everything is equal on merits.

14. Proviso to subsection 5 of section 35 of the Act, 1972 has to be read, interpreted and given effect to so that it may not go contrary to main section or may not render the provision itself to be a nugatory or unworkable. The provision has to be interpreted in the context and with reference to the criteria on the basis of which the selection and appointment to the post of Headmaster has to be made. At the cost of repetition, it is to be stated that admittedly the criteria for selection is merit-cum-seniority. If we go by the criteria, I find that the seniority will play role only where both the candidates were found to be of equal merits. In such cases, out of two candidates, the selection committee has to decided to whom the preference has to be given and certainly the seniority is a relevant and good consideration. But where the two candidates are not found to be of same merits this proviso cannot be put into service and meritorious candidate cannot be ousted. In case the interpretation which is sought to be made and given to this provision by the learned counsel for the petitioner is accepted then the element of selection on merits will go. In case the legislature was intending to make the appointment of a senior teacher of the school concerned no such provision was necessary. The provision could have been for promotion and not the appointment by selection by open invitation. The intention of the legislature is very clear and it intended to provide that only meritorious persons may become Headmaster of the school concerned. Only where the candidates are of equal merits then this proviso has to be put into service and the senior teacher of the school concerned has to be given the preference. This preference, at the cost of merits, is not intended by this provision nor it can be read in the provision. The proviso has to be given effect to and it will be workable only in case where both the candidates are found to be of equal merits the preference can be given to the senior teacher of the school concerned and not as a rule and course. The eligibility does not mean merit of the candidate. The petitioner is eligible and naturally if we go by the comparative merits she can though may be said to be suitable for the post but can not be given the appointment as it is to be made on the basis of merit

criterion. To determine the comparative merits of the candidates, naturally some devise has to be provided and in this case the devise has been provided and on the basis of which the selection committee has assessed comparative merits of the candidates and whosoever is found to be meritorious on comparative merits he/she has to be given the appointment and accordingly late respondent NO.3 has been given the appointment, to which no exception can be made. The petitioner could not stand to merits with that lady and in case the preference is given to her then this very basic criteria for making appointment by selection on merits will become nugatory and this provision will be of no effect because then selection will be only subjective selection and not the selection on merits. I cannot do better than to here refer the decision of the Apex Court in the case of Executive Officer vs. E. Tirpalu (*supra*) where the court has held:

It is quite evident from the facts enumerated hereinabove that no prejudice could be regarded to have been caused to the respondents by their being regarded as ex-inmates. The total number of vacancies which were available were more than the total number of candidates who were inmates and ex-inmates. It is unfortunate that these in-house candidates were not selected. Clause (b) of Rule 6 which refers to preference being given to the inmates in appointment in the Devasthanams does not and cannot imply that irrespective of the merits of the candidates, the inmates have to be given appointments. The appellants have rightly resorted to the procedure of making selection from the inmates, ex-inmates and general candidates who were eligible, by holding written test/interviews and clause 6 can only mean that with the merits of the candidates being equal, preference would be given to the inmates of the Balamandir.

15. The Tribunal in this case has not committed any error in passing of the impugned order. The judgment of the Tribunal is in consonance with the provisions of section 35 (5) of the Act, 1972 and the decision of this Court in the case of Maganbhai vs. Olpad Taluka Azaddin (*supra*). The interpretation which has been given by the Tribunal to the said provision is perfectly in consonance with the intention of the legislature for which this provision has been made as well as the law laid down by their Lordships of the Hon'ble Supreme Court and this court.

16. In the result, this special civil application fails and the same is dismissed. Rule discharged. Interim relief, if any, granted by this Court stands vacated. No order as to costs.

zgs/-